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No. 90-6704

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DAVID F. DAWSON,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Delaware

BRIEF FOR RESPONDENT

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COUNTER-QUESTION PRESENTED

Delaware uses a "Georgia" or "*Gregg*" type of procedure for determining who shall be sentenced to death after being convicted of first degree murder. Under such a scheme, did it contravene the federal Constitution, for the sentencing jury to consider, as a factor in deciding whether death is the appropriate penalty, prosecution evidence that the defendant belonged to a "white racist prison gang" calling itself the "Aryan Brotherhood?"

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BRIEF FOR RESPONDENT

The State of Delaware, respondent, asks this Court to affirm the decision of the Supreme Court of Delaware upholding the verdict of the jury sentencing David Dawson to death for first degree murder

COUNTER-STATEMENT OF THE CASE

Petitioner, David Dawson, was found guilty of first degree murder, robbery, burglary, and multiple weapons offenses. He was sentenced to death for the murder and to an additional 100 years of imprisonment for the other

offenses. J.A. 135-36 (*Dawson v. State*, 581 A.2d 1078, 1081 (Del. 1990)).

1. The Murder

On December 1, 1986, Dawson was, as he had been almost all of his teenage and adult life, an inmate at a Delaware correctional institution. Early that morning, Dawson and three other inmates escaped from the Delaware Correctional Center near Smyrna in central Delaware.[1] Once outside, the four separated: the three other prisoners stole a car and proceeded north towards Wilmington while Dawson took another car and headed southward. Outside the small rural community of Kenton, Dawson broke into the home of Frank and Dorothy Seeney. Inside, he took a leather motorcycle jacket, several pocket watches, and various containers holding loose change. J.A. 138-40 (581 A.2d at 1082-83).

Dawson then turned his attention to the home of Richard and Madeline Kisner, a short distance away. There, he surprised Mrs. Kisner as she was preparing to go to work and brutally murdered her. When Mrs. Kisner's sixteen year old son returned home from school later that afternoon, he found his mother's body in her bedroom. She had been bound with shoelaces, stabbed in the chest twelve times, strangled with a stocking, and gagged with a sock. Missing was Mrs. Kisner's car as well

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[1] Delaware correctional authorities had identified Dawson and the three other escapees (Richard Irwin, Mark McCoy, and Larry Nave) as members of a gang in the correctional facility calling themselves the Aryan Brotherhood. J.A. 39.

as several two dollar bills the slain woman had always kept in her wallet. J.A. 140-42 (581 A.2d at 1083-84).

Still fleeing southward, Dawson appeared later that evening in several bars around the town of Milford, wearing a motorcycle jacket and giving one woman in one bar one of the watches he had taken in the first burglary. Near one of the bars, the police found Mrs. Kisner's car. In it, Dawson had left not only his fingerprints but a postcard bearing his nickname. J.A. 142-43 (581 A.2d at 1084).

Later that night, the police finally apprehended Dawson. At the time, Dawson was still wearing the leather jacket stolen from the Seeney residence which now had fibers from Mrs. Kisner's housecoat. Inside the jacket pockets were four watches taken from the Seeney house and a two dollar bill. A sock, matching the one used to gag Mrs. Kisner, was in Dawson's pants pocket. J.A. 144-45 (581 A.2d at 1084-85).

2. The Trial

The grand jury charged Dawson with first degree murder, under four separate counts, and with eleven other crimes arising from his murderous spree during his escape.[2] Prior to trial, Dawson asked the trial court to bar

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[2] One murder count alleged that Dawson had intentionally killed Mrs. Kisner; a second charged that he killed her during the course of a prison escape; and the two remaining murder counts charged him with killing her during the commission of the felonies of robbery and burglary. Del. Code Ann. tit. 11, § 636(a)(1), (a)(2), (a)(6), (a)(7) (1987).

the prosecution from introducing any evidence linking him with the prison gang called the Aryan Brotherhood, including any evidence that he bore tattoos of both the gang's name and swastikas. J.A. 2, 4-6. At that time, the trial court, with the prosecution's assent, conditionally excluded any evidence about the gang during the guilt-innocence phase of the trial. J.A. 5, 25 (trial court rulings); J.A. 21-22 (prosecution's agreement). However, because the trial court felt that such evidence might be admissible at any later penalty hearing, it agreed to question all the prospective jurors if "evidence relating to membership in an organization called the Aryan Brotherhood, a white supremacist group" would "affect [their] ability to serve as a fair and impartial juror in [the] case." E.g., Tr. A-56.[3]

At trial, the prosecution presented various witnesses to detail the events during the escape and to link Dawson to Mrs. Kisner's murder by forensic tests. J.A. 138-45 (581 A.2d at 1082-85). Dawson did not testify, but the defense presented three witnesses. The defense strategy was to admit that Dawson had been in the Kisners' house and had helped to subdue Mrs. Kisner, but to suggest that she had been killed by the other three escapees when he had gone outside. In apparent support of that theory, the defense introduced the clothing worn by Dawson when he was arrested, including a belt which "had two letters A and B separated by a swastika on the buckle." Def. Exh. 7 (Tr. J-49). *See also* J.A. 36 (description of belt). The jury

[3] Dawson challenged for cause, and the trial judge excluded, six prospective jurors on the basis of their answers to this inquiry. Tr. B-148-49, 170-71, 248-50; Tr. D-13-17, 57-58, 77-78.

returned guilty verdicts on all of the charges, including all four of the murder counts.

3. The Penalty Proceedings

After Dawson was convicted, the prosecutors represented that during the penalty hearing, they intended to introduce: 1) testimony, from an expert employed by the federal prison system, about the origin, nature, and central tenets of the Aryan Brotherhood; 2) photographs showing a tattoo on Dawson's hand bearing the words "Aryan Brotherhood" and showing tattoos on his back of swastikas; 3) a photograph of a large swastika painted by Dawson on the wall of his prison cell; and 4) articles found in Dawson's belongings bearing swastikas or insignia of the Aryan Brotherhood and written documents referring to white supremacy. J.A. 32-38. The prosecutors also indicated that Delaware police officers and correctional officials were available to testify about the nature of the Brotherhood at the Delaware prison where Dawson and his fellow escapees had been incarcerated. J.A. 39, 44. Dawson again objected, arguing that any such evidence was irrelevant and prejudicial. In addition, he asked the trial court to exclude any evidence indicating that he bore a large tattoo of the name "Abaddon" on his stomach or that he had ever used that name. J.A. 29, 54, 57. In response, the prosecutors acknowledged that they could not show that Dawson, while in prison, had committed any unlawful act in conjunction with his membership in the Aryan Brotherhood. J.A. 48. However, they argued that the proffered Brotherhood evidence was logically relevant to the issue of his "character," one of the issues

the Delaware death penalty statute required the sentencing jury to consider. The evidence would allow the jury to know what "he is into" and would show "the kind of thing he ascribes to." J.A. 38, 48-49. While conceding that the Brotherhood evidence would "provide[] some clue to his character," J.A. 41, Dawson argued that introduction of the evidence would allow the jury to punish him, contrary to the First Amendment, for his beliefs. J.A. 41, 51.

After hearing these arguments, the trial court ruled that Dawson's affiliation with the Aryan Brotherhood was logically relevant to the statutory issue of "character," finding that "membership or the act of joining an organization of any particular kind, whether it be the Aryan Brotherhood or the Boy Scouts of America[], can be probative of character, at least to some extent." J.A. 52. However, before the court could determine whether the proffered evidence, although relevant, would be unfairly prejudicial, the prosecution and defense reached an accord. J.A. 52, 56. Under the agreement, the prosecution could introduce the picture of Dawson's hand with the Aryan Brotherhood marking, and the jurors would be told:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

J.A. 56. In consideration, the prosecution would not present any witnesses to testify about the Brotherhood,

either locally or nationally. Dawson agreed that the stipulation rendered moot his motion in limine. J.A. 53.

Additionally, the defense successfully moved to bar introduction of any photographs of Dawson or his possessions showing swastikas, arguing that such exhibits could only be cumulative of the evidence of "white supremacy that is contained in the stipulation" and that, by the agreement, Dawson had already stipulated he was a "member of a white supremacist group." J.A. 55-57. Finally, the trial court ruled that the prosecution could also introduce a photograph showing the name "Abaddon" tattooed on Dawson's stomach as well as testimony that, while at one bar after the killing, he had referred to himself as "Abaddon," explaining that the name meant "one of Satan's disciples." In light of the defense concession that its only objection was to the photograph and the prosecution could instead present testimony that "he has a tattoo . . . or he used this identity," the trial court found the evidence relevant and not unfairly prejudicial. J.A. 54-55, 57-58.

When the penalty hearing began, the prosecution relied upon the existence of three statutory aggravating circumstances, two of which had been established by the jury's verdicts, to render Dawson *prima facie* eligible for the death penalty.[4] Consequently, when it presented its

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[4] The three statutory aggravating circumstances were 1) the murder was committed by an escapee; 2) the murder was committed during the commission of a burglary or robbery; and 3) the murder was committed for pecuniary gain. Del. Code Ann. tit. 11, §§ 4209(e)(1)a, (e)(1)j, (e)(1)o (1987).

(Continued on following page)

evidence to the sentencing jury, the prosecution focused on what it billed as "non-statutory" aggravating circumstances, relating to Dawson's character. First, the prosecution offered records detailing Dawson's lengthy history of disregard for the law, including six juvenile commitments, fourteen adult convictions, six earlier escapes as both a juvenile and adult inmate, and 24 misconduct violations while incarcerated. J.A. 65-79. Secondly, consistent with the agreement reached with the defense, the prosecution introduced the picture of Dawson's right hand, showing the name "Aryan Brotherhood," and read to the jury the statement describing the Brotherhood as a "white racist prison gang." J.A. 82-84; State's Exhs. 86, 87 (Tr. M-100-02). The prosecution then introduced the Abaddon evidence, beginning with the photograph of the word tattooed on Dawson's stomach. J.A. 84-85; State's Exh. 88 (Tr. M-104). To explain the name to the jurors, a police officer, relying on a dictionary, testified that the term was a biblical one, meaning "angel of the bottomless pit." J.A. 86. Finally, Patty Dennis, one of the women who

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Under the Delaware statute, the jury's earlier verdicts finding Dawson guilty of killing during the course of an escape and killing in the commission of a burglary and a robbery automatically established the first two of the above statutory aggravating circumstances. Del. Code. Ann. tit. 11, § 4209(e)(2) (1987); *Whalen v. State*, 492 A.2d 552, 560 n.5 (Del. 1985); *Flamer v. State*, 490 A.2d 104, 127 (Del. 1983 and 1984), *cert. denied*, 464 U.S. 865 (1983) and 474 U.S. 865 (1985). In its instructions to the jury at the end of the penalty hearing, the court told the jury to mark the special verdict interrogatory in accord with the statutory directive. Tr. N-79-80.

had been with Dawson in Milford after the killing, testified that Dawson had introduced himself to her as "Abaddon" and had told her that the name meant "one of Satan's disciples." J.A. 80-81.

Dawson did not testify at the penalty hearing, but the defense did present mitigating evidence. First, during cross-examination of the prison records clerk, defense counsel elicited testimony that Dawson, during his earlier years in prison, had earned various good time credits by enrolling in drug and alcohol treatment programs, attending group counselling, and working in prison industries. J.A. 79-80. Next, both Dawson's aunt and his half-sister told the jury that they still loved Dawson, despite his criminal activities, and that they visited him in prison and intended to continue to do so. J.A. 90, 92-93. Finally, the relatives recounted how Dawson had never known his father, and had, as a young child, been raised primarily by his aunt and his grandmother. According to them, his encounters with the law began when he was twelve years old and after his grandmother had died. J.A. 88-92. In addition, his aunt laid before the jury the story that once, when his dying young cousin needed a kidney transplant, Dawson, in a phone conversation, had offered to donate one of his kidneys. J.A. 89-90.

In their penalty hearing summation, the prosecutors focused on the statutory criteria of the "circumstances . . . of the offense" and the "character and propensities of the offender." Del. Code Ann. tit. 11, § 4209(d)(1)b (1987). When they turned to Dawson's character, the prosecutors wove Dawson's criminal record, his self-identification as Abaddon, and his embrace of the Aryan Brotherhood into a central theme that Dawson had

an incorrigible character with his entire life showing repeated decisions to reject any redeeming paths. Thus, after detailing the long history of Dawson's illegal conduct, one of the prosecutors told the jurors:

> . . . We introduced evidence to you, ladies and gentlemen about other things which go directly to his character and propensities. The Aryan Brotherhood is a white racist prison gang. What does that tell you about David Dawson? It is not just a casual association. He has branded himself with his tattoo Aryan Brotherhood.
>
> Could have joined the JC's [Jaycees] in prison. Could have gotten his GED. Could have done something good. What does he become? An Aryan Brother. What does that say about his character and propensities?

J.A. 105. Alluding to the Abaddon evidence, the prosecutor continued with the theme that Dawson simply was incorrigible:

> He has taken the name Abaddon. We didn't tell you that because necessarily, or even for any religious reason, but it tells you something about what Abaddon means: The ang[el] of the bottomless pit, one of Satan's disciples. What does that say about how he views himself, how he would like to be seen by other people? What purpose could there be in calling himself the angel of the bottomless pit, Abaddon, other than to tell people you better watch out for me. I am bad.
>
> This is not a passing fancy, a fad, a phase in his life. It is a direction his life has turned. It is just not a nickname he goes by. He has marred his body with that tattoo: Abaddon. He is serious about this, ladies and gentlemen. All the way across his stomach A B A D D O N in block letters that high. He relishes that connotation, that impression of evil: the ang[el] of the bottomless pit.

> Those are the non-statutory aggravating circumstances, ladies and gentlemen. Those are other reasons why – those are the character, they reflect the character, the propensities of David Francis Dawson. They tell you what type of person he is.

J.A. 105-06. Finally, the prosecutor compared these facets of Dawson's life to the evidence Dawson had advanced in mitigation:

> How do those meritorious good time credits stack up against the bad conduct, the felony conviction? Where is going to AA compare with proclaiming yourself an Aryan brother? Where does abstinence of alcohol, where does temperance range in his list of priorities compared to associating himself with a racist gang?
>
> What does that tell you about the significance of those mitigating circumstances? Where do the few picnics at the prison, how do they weigh against his repeated escapes and his weapon charges in jail?
>
> Where does the love of [a] half sister who sees him two or three times a month weigh against the real David Dawson who 7 days a week, 35 [sic] weeks a year is Aryan brother David Dawson, is Abaddon?

J.A. 106-07.

When he addressed the jury, defense counsel conceded that Dawson was an Aryan Brother and a white supremacist. J.A. 116. Yet, alluding to "freedom of speech" and "freedom of thought," he cautioned the jury that they should not give any weight to those facts, or

similarly to Dawson's use of the name Abaddon, because the prosecution had not shown any correlation between his membership in the gang or his use of the name Abaddon and any harm or any disruption caused in prison by Dawson. According to counsel, if the jurors gave effect to such evidence, they would be sentencing Dawson to death because of his beliefs. J.A. 115-17. Instead, the defense suggested that the evidence about Dawson's prison jobs and his involvement in prison programs showed that Dawson was "not just sitting in prison lying around doing nothing" but had made some "attempts to do certain things to at least improve his life." J.A. 121. Moreover, even if that evidence did not warrant the penalty of life imprisonment, instead of death, then, according to Dawson's attorney, the jurors should exercise mercy simply because there were people, such as Dawson's aunt and half-sister, who still cared for Dawson. J.A. 120-21.

In rebuttal, the prosecution again emphasized the purpose for its introduction of the Aryan Brotherhood and Abaddon evidence:

> And he accuses the State of having introduced inflammatory terms in this case: the Aryan Brotherhood and Abaddon. And he says well, if he has these thoughts, what's the harm?
>
> We are not required, ladies and gentlemen, to show there is another harm in the word Abaddon. It doesn't even make sense that there is. Obviously there isn't. If he wants to call himself Abaddon, fine. If he wants to join the Aryan Brotherhood, fine. If he wants to join the JC's [Jaycees], fine.

> You can bet if he joined the JC's you would hear about that in mitigation. You can bet if he joined the Kiwanis Club you would have heard about that in mitigation because it reflects upon the defendant's character. It tells us something about him.
>
> And what did Patty Dennis tell us about. It tells us something about the defendant that within 12 hours of this crime, of this brutal murder, he is describing himself to a complete stranger as one of Satan's disciples. It tells us something. Not that there is harm in it, but we are looking at the character of the defendant.

J.A. 125-26.

In its instructions, the trial court outlined the Delaware capital sentencing scheme, telling the jurors that they were required to consider all the aggravating circumstances and mitigating circumstances. According to the instruction, "[a]n aggravating circumstance [was] any factor relating to the crime or to the offender which tends to make the defendant's conduct more serious or the imposition of a penalty of death appropriate. . . ." J.A. 131. Conversely, the trial court said that "[a] mitigating factor [was] any factor relating to the crime or to the offender which tends to make the defendant's conduct less serious or the imposition of death inappropriate." *Id.* And it also told the jury that "[r]egardless of any of the circumstances," the jury had the absolute "discretion" to recommend a sentence of life imprisonment. *Id.* After deliberating for two hours, the jury returned its verdict, reporting that they found, beyond a reasonable doubt, the existence of all three statutory aggravating circumstances and that they unanimously recommended that Dawson be sentenced to death. The trial court, bound by law to

accept the recommendation, sentenced Dawson to die by lethal injection.

4. Appeal to the Delaware Supreme Court

Dawson appealed his conviction and sentence to the Delaware Supreme Court, advancing as two of his ten challenges, that the Aryan Brotherhood and Abaddon evidence should not have been admitted at the penalty hearing. Affirming the conviction and sentence, the Delaware Supreme Court rejected Dawson's contentions. The court found that under the state's capital punishment statute, the sentencing jury was allowed to consider a wide range of evidence, both in mitigation and aggravation, which might relate to "all the specific circumstances of the crime and the defendant." J.A. 186 (581 A.2d at 1101) (internal quotation omitted). The state court recognized that the main thrust of the prosecution's evidence at the penalty hearing was to show that Dawson's killing of Marie Kisner was consistent with the incorrigible nature of his character. J.A. 187 (581 A.2d at 1101). Under Delaware's sentencing procedure, the prosecution could offer the Aryan Brotherhood and Abaddon evidence to show that character. In the court's view, Dawson's selection and use of the name Abaddon "was relevant to his character because it was a reflection of how Dawson viewed himself and how he wanted to be viewed." J.A. 187-88 (581 A.2d at 1102). Furthermore, Dawson's decision to join a prison gang was relevant to the question of his character because his "affiliation with this type of organization was not only indicative of how he identified himself and how he wanted to be identified by others but

again was characteristic of his lawless nature and rejection of rehabilitation during his incarceration." J.A. 188 (581 A.2d at 1102).

Having found the evidence relevant, the court turned back Dawson's contention that the use of this evidence violated the First Amendment. Adopting the rationale of the Pennsylvania Supreme Court rejecting a similar challenge, the Delaware court ruled: " '[p]unishing a person for expressing his views or for associating with certain people is substantially different from allowing . . . evidence of [the defendant's] character [to be considered] where that character is a relevant inquiry.' " J.A. 190 (581 A.2d at 1103) (quoting *Commonwealth v. Abu-Jamal*, 555 A.2d 846, 859 (Pa. 1989), *cert. denied*, 111 S.Ct. 215 (1990)). Finding that the Aryan Brotherhood and Abaddon evidence had been presented in a manner "which did not shift the jury's attention away from the issue of Dawson's character," the court concluded that the admission of such evidence during the penalty hearing did not violate Dawson's rights. J.A. 191-92 (581 A.2d at 1103).

Finally, the state supreme court also reviewed Dawson's death sentence under the statutory requirement that it determine whether, "considering the totality of the circumstances of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender, the death penalty was either arbitrarily or capriciously imposed . . . or disproportionate to the penalty imposed in similar cases . . . . " Del. Code Ann. tit. 11, § 4209(g)(2)a (1987). The court concluded that "the weight

of the statutory and non-statutory aggravating circumstances completely overwhelmed the mitigating circumstances." J.A. 203 (581 A.2d at 1108). Because the record reflected the existence of "three statutory aggravating circumstances, significant non-statutory aggravating circumstances, and virtually no evidence of mitigation," J.A. 205 (581 A.2d at 1109), Dawson's death sentence was neither arbitrary nor disproportionate.

SUMMARY OF ARGUMENT

The federal Constitution does not mandate the creation of a prophylactic rule barring a capital sentencing jury from considering, at the final discretionary stage of the process, evidence that Dawson was a member of a white racist prison gang. Such evidence is reflective of character, the consideration of which is manifestly relevant in death penalty proceedings. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

Delaware has chosen a "Georgia" or *"Gregg"*[5] procedure for determining when a convicted murderer should be sentenced to die. The universe of first degree murders is first narrowed by requiring the jury to find, beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance. If that threshold is passed, the jurors look to "all relevant evidence in aggravation or mitigation" concerning the crime and the "character and propensities of the offender." Del. Code Ann. tit. 11, § 4209 (1987). Only if a statutory aggravating

[5] *Gregg v. Georgia*, 428 U.S. 153 (1976).

circumstance is found, may the jury then weigh the statutory and non-statutory aggravating factors against the mitigating factors and consider imposition of the death penalty. At that final discretionary stage, the jury decides both whether to attach a non-statutory aggravating or mitigating label to the evidence found, what weight to accord each factor, and whether to grant mercy. Dawson's membership in the Aryan Brotherhood, a white racist prison gang, was properly considered at this final stage. Indeed, a reasoned moral response to Dawson's character is impossible without access to a full range of information and the individual juror's freedom to consider moral values.

Dawson was not death eligible as a result of any consideration of his association with the Aryan Brotherhood or belief in racial bigotry. Thus, Delaware's decision to allow a full range of information about a defendant's character does not offend the First Amendment. Character evidence, by its very nature, is not "value-neutral" and, of course, racial intolerance is not a positive character trait. Dawson's efforts to control character evidence by labeling positive traits as mitigating evidence, but negative traits as protected speech or beliefs must be rejected.

ARGUMENT

NEITHER THE FIRST AMENDMENT NOR THE DUE PROCESS CLAUSE PREVENTS A SENTENCING JURY FROM CONSIDERING ALL EVIDENCE REFLECTING ON THE CAPITAL DEFENDANT'S CHARACTER, INCLUDING EVIDENCE THAT HE HAD EMBRACED A RACIST PRISON GANG.

This case involves the unique jurisprudence of capital sentencing and its requirement that the sentencer treat

each capital defendant as a unique individual. As Justice Blackmun has recently said: "[m]ore than any other decision known to our law, the decision whether to impose the death penalty involves an assessment of the defendant himself, not simply a determination as to the facts surrounding a particular event." *Clemons v. Mississippi*, 110 S.Ct. 1441, 1460 (1990) (dissenting opinion). According to Dawson, the jurors sitting at his penalty hearing making this assessment of his "character and propensities," Del. Code Ann. tit. 11, § 4209(d)(1)b (1987), could consider evidence that he joined Alcoholics Anonymous, earned good time credits while in prison, that he had not known his father and had been raised by relatives, that he had once offered to donate a kidney to a young dying cousin, and that he had an aunt and sister who still loved him. However, Dawson asserts that the federal Constitution bars other character evidence showing that during his tenure in prison, he had chosen to embrace a white racist prison gang calling itself the "Aryan Brotherhood."[6] Agreeing that one's beliefs and decisions to join

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[6] Dawson and his *amici* suggest that the evidence presented at the penalty hearing was "speculative" about whether Dawson was a member of the Aryan Brotherhood and whether he shared its ideology of racism. Brief for Petitioner at 15; Brief for American Civil Liberties Union, *et al.*, as *amici curiae* at 5-6 & n. 3. However, at the penalty hearing, Dawson closed the link between the Aryan Brotherhood and his own views. In closing argument, defense counsel told the jurors that Dawson is an "Aryan Brother and a white supremacist," J.A. 117, but that the jurors should not allow their distaste for those beliefs nor his membership in the gang to influence their decision. In addition, the evidence showed that Dawson had the name of the gang inscribed on his hand. From that, the jury could easily

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groups shed light on a person's character, Dawson claims that the First Amendment permits him to argue, and juries to find, that such decisions and beliefs are mitigating factors in capital sentencing proceedings, but bars the prosecution from labeling in argument, and jurors from considering, such information as aggravating factors.

To support his argument, Dawson invokes two traditional First Amendment precepts: first, that criminal penalties can never be imposed nor aggravated because of an individual's beliefs; and secondly, that government – here in the form of his sentencing jury – must always remain "value-" or "content-neutral" within the realm of a person's beliefs or views. However, these traditional First Amendment precepts do not easily fit into a capital sentencing jurisprudence where the Eighth Amendment requires the sentencer to inquire into a capital murderer's "character" and then to decide whether to grant – or

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infer that Dawson's embrace of the gang was not a fleeting one. Third, the jury was not required to overlook the gang's use of the name "Aryan," a term commonly linked to the doctrine of racial supremacy which reigned in Nazi Germany. From that name, as well as the stipulation's recital that the Brotherhood had begun "in response to other gangs of racial minorities," J.A. 84, the jurors could find that the Brotherhood's brand of racism went far beyond cellblock discussions of sociological data. Instead, the ideology of white supremacy held by the Brotherhood and of Dawson was that of racial hatred. Finally, Dawson should not now be able to object to the supposed blandness of the evidence after he successfully used the existence of the stipulation to prevent the introduction of other evidence, such as photographs of his swastikas, which more vividly reflected the nature of Dawson's views. *See* J.A. 54-58.

forego – the elusive concepts of mercy and leniency. To adopt Dawson's argument and make a capital defendant's beliefs off-limits from judgmental scrutiny would seriously undermine the Eighth Amendment's imperative that any death sentence " 'reflect' " the sentencer's " 'reasoned *moral* response to the defendant's background, character, and crime.' " *Penry v. Lynaugh*, 109 S.Ct. 2934, 2947 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (emphasis in original). Moreover, to accept his argument – which preserves to capital defendants the ability to offer the defendant's beliefs as "mitigating" evidence, but muzzles the prosecution – would make the process of "individualized" sentencing less reliable. In its difficult effort to appraise the defendant's character, the capital sentencer would be deprived of the "fullest information possible concerning the defendant's life and characteristics," focusing on "every aspect of [the] defendant's life." *Williams v. New York*, 337 U.S. 241, 247, 250 (1949).

1. The Eighth Amendment Imposes Few Limitations On The Evidence A Capital Sentencing Jury May Consider.

Over the last decade, the Court has generally refused to set any constitutional limits on the factors that may be placed before, and be considered by, a sentencing jury when it is called to make the decision whether a capital defendant should live or die. Instead, the Court's principal concern "has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the

defendant falls within the category of persons eligible for the death penalty." *California v. Ramos*, 463 U.S. 992, 999 (1983) (emphasis in original). Indeed, just last term, this Court reaffirmed that the Eighth Amendment applauds, rather than condemns, those capital sentencing schemes which allow " 'the jury to have as much information before it as possible when it makes the sentencing decision.' " *Payne v. Tennessee*, 59 U.S.L.W. 4814, 4817 (U.S. June 27, 1991) (No. 90-5721) (quoting *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." *Ramos*, 463 U.S. at 1008.

At the same time, this Court has repeatedly emphasized that the Eighth Amendment compels the states to allow a capital defendant to put before the jury, virtually without limitation, *any* aspect of his "character," "background," or "the circumstances of the crime" which might move the sentencer to return a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982). *See also Penry*, 109 S.Ct. at 2946-47, 2951; *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986). Moreover, this Court has never suggested that the information flow to the sentencer on these criteria must spring only from the defense. The states remain free to allow the prosecution the leeway to offer "circumstances" and "factors" in "aggravation" beyond those used by the legislature to define the class of those convicted murderers eligible for the death penalty. *Zant v. Stephens*, 462 U.S. 862, 878

(1983). Indeed, to grant the capital defendant exclusive domain over presentation of the evidence on the crucial factors of the "nature of his crime" and his "character" and "background" would make the sentencing decision less reliable. It would "prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Payne*, 59 U.S.L.W. at 4818.

Delaware has chosen a "Georgia" or "*Gregg*" procedure for determining when a convicted murderer should be sentenced to die. *Flamer v. State*, 490 A.2d 104, 134-36 (Del. 1983 and 1984), *cert. denied*, 464 U.S. 865 (1983) and 474 U.S. 865 (1985); *State v. White*, 395 A.2d 1082, 1085 (Del. 1978). First, in order to satisfy the Eighth Amendment's command that the class of murderers be narrowed to those who deserve to die, the sentencing jury must find the existence of at least one of the listed statutory aggravating circumstances. Del. Code Ann. tit. 11, §§ 4209(d)(1)a, (e)(1) (1987) (*reproduced in part* at Brief for Petitioner at 3). Once past that threshold, the jurors can look to "all relevant evidence in aggravation or mitigation which bears upon the circumstances or details of the commission of the offense and the character and propensities of the offender" to determine whether death remains the appropriate penalty. § 4209(d)(1)b (Brief for Petitioner at 3). Any evidence is material so long as it is "relevant and admissible to the penalty to be imposed." § 4209(c)(1) (Brief for Petitioner at 2-3). Consequently, both the prosecution and the defendant may offer a wide range of evidence probative of "all the specific circumstances of the crime and the defendant." *White*, 395 A.2d at 1089. *See, e.g., Deputy v. State*, 500 A.2d 581, 598 (Del.

1985) (defense offered "mitigating" evidence consisting of records of defendant's prior psychiatric commitments, testimony by ministers and lay instructor of work with defendant in jail, and testimony by defendant describing his reverence and change of lifestyle), *cert. denied*, 480 U.S. 940 (1987); *DeShields v. State*, 534 A.2d 630, 649 (Del. 1987) (defense offered "mitigating" evidence that accused was model prisoner, that relatives still loved him, and that he had had a troubled youth), *cert. denied*, 486 U.S. 1017 (1988). As under the Georgia scheme, in Delaware, the jury, in making its ultimate decision, has unconstrained discretion to choose life, rather than death, without regard to the aggravating or mitigating circumstances or to their comparative weights. *Whalen v. State*, 492 A.2d 552, 560 (Del. 1985). The jury can return a verdict of life imprisonment for any reason or for no reason at all. *See* J.A. 131 (jury instructions).

It is against this background that Dawson's challenge to his jury's consideration of the Aryan Brotherhood prison gang evidence must be measured.

2. An Evaluation Of a Capital Defendant's "Character" Permits an Inquiry Into His Racist Beliefs And Involves The Exercise of Judgment by the Sentencing Jury.

The parties do share one common piece of ground. In this Court, as he did in the trial court (J.A. 41), Dawson concedes that his conscious choice to embrace both the Aryan Brotherhood and its white supremacist ideology does indeed reflect something about his "character", as that term is commonly understood. *See* Brief for Petitioner at 23 ("Our beliefs may shed light on our character

in all sorts of ways. . . . "). One's beliefs, one's expressions, and one's conscious conduct – which in many cases may simply be a symptom of one's thoughts or beliefs – both define and reflect one's "character" or "personality."[7]

Of course, Delaware has not made it a criminal offense to believe in or publicly express racist ideology. *See Brandenburg v. Ohio*, 395 U.S. 444, 446-49 (1969) (*per curiam*). David Dawson was not before a sentencing jury because he was a white supremacist. So too, Dawson was not facing the death penalty because of his embrace of the Aryan Brotherhood. Neither one's belief in racial superiority nor one's association with a racist gang constitutes a statutory aggravating circumstance under Delaware's capital sentencing statute.[8] Instead, Dawson became eligible for the death penalty because he intentionally killed Madelene Kisner during a burglary and robbery in her home after he had escaped from prison. It was that *conduct* which the community, through the Delaware legislature, has defined as "so grievous [an] affront to humanity that the only adequate response may be the penalty of death." *Gregg*, 428 U.S. at 184 (opinion of Stewart, Powell, and Stevens, JJ.). Here, the evidence of Dawson's embrace of the Aryan Brotherhood became relevant only

[7] Indeed, to some, the purpose of the freedom of speech clause is to allow development of a person's autonomous personality. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[8] Admittedly, the Constitution might bar a state legislature from using racial ideology as a death penalty trip wire. *Zant v. Stephens*, 462 U.S. 862, 885 (1983). However, Dawson's reading of *Zant* as barring any consideration of the defendant's beliefs goes too far.

when the sentencing jury, as the "conscience of the community," *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), had to decide whether "to afford mercy." *Gregg*, 428 U.S. at 203 (opinion of Stewart, Powell, and Stevens, JJ.).[9] At that discretionary stage, each juror could look, not only to details of Dawson's crime, but to his "character" to see if he "ha[d] virtues that can fairly be balanced against society's interest in killing him in retribution for his violent crime." *Franklin v. Lynaugh*, 487 U.S. 164, 189 (1988) (Stevens, J., dissenting). As one commentator has said, explaining jurors' use of such "character" evidence in this part of the capital sentencing process:

> To assume that jurors act of pure moral retribution is to assume they focus on the crime more than the criminal and hence rely chiefly on the aggravating circumstances. Certainly the presence of very serious aggravating factors makes the defendant a strong *prima facie* candidate for death. But if jurors pay at least some attention to mitigating evidence, they would not seem to be acting out of pure moral retribution. If the jurors

[9] The Delaware capital punishment statute, unlike those in some other states such as Pennsylvania, *see Blystone v. Pennsylvania*, 110 S.Ct. 1078, 1081-82 (1990), does not create an evidentiary presumption in favor of death once the jury determines that statutory aggravating circumstances exist. Indeed, the Delaware statute tilts toward the exercise of mercy: death can be imposed only if the jury, after passing the statutory aggravating circumstances threshold, unanimously recommends that sentence after considering a wide gamut of evidence. However, the statute's allocation of evidentiary burdens does not change the basic premise that the statutory aggravating circumstances define those killings which warrant the imposition of the death penalty, the jury's focus thereafter being directed at deciding whether to forego that sanction.

> do assess the defendant's general character, or the excuses he offers for the murder, at best we can say that they will act out of moral retribution when the crime is otherwise unredeemed by the defendant's good qualities or excused by psychological causes.

Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 390-91. Of course, at this discretionary stage, the inquiry may be far reaching; any evidence may be relevant so long as it might shed light on whether death is the appropriate penalty. Contrary to Dawson's premise, the evidence is not limited to evidence of the capital defendant's past conduct. For example, in seeking to move the jury towards leniency, the defendant can presumably put before the sentencer evidence of his own beliefs, such as "that he had a great love for the victim's race, or that he had a pathological hatred for the victim's race," or indeed "that he despised his mother." *Walton v. Arizona*, 110 S.Ct. 3047, 3062 (1990) (Scalia, J., concurring). A person's beliefs have never been outside the relevant scope of the sentencer's inquiry.

So too, the inquiry is not one where the sentencer can remain "value-neutral" in response to such evidence. As this Court has recognized, the inquiry in this final phase requires the "individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant," *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987), in order to render a "reasoned moral response." *Penry*, 109 S.Ct. at 2947. But if the inquiry is a moral one calling for the exercise of discretion, it cannot be one devoid of value judgments about the nature of the defendant's conduct or beliefs: concepts of "good," "bad," "redeeming," and "unredeeming" permeate the entire

inquiry. No individual juror can determine whether a defendant possesses "redeeming qualities," *Boyde v. California*, 110 S.Ct. 1190, 1208 (1990) (Marshall, J., dissenting), or has "positive character traits," *Franklin*, 487 U.S. at 186 (O'Connor, J., concurring), nor can she or he evaluate whether the defendant's murderous conduct was "an aberration from otherwise good character," *Boyde*, 110 S.Ct. at 1199 n. 5, without bringing to bear his or her own "moral, factual, and legal judgments." *Barclay v. Florida*, 463 U.S. 939, 950 (1983) (plurality opinion). Once again, by example, capital defendants, within and without Delaware, routinely offer evidence of prior religious devotion or a belated religious rebirth as reasons for the jurors to grant mercy. *See, e.g., Deputy v. State*, 500 A.2d 581, 598 (Del. 1985) (testimony from defendant, three ministers, and Bible reader about defendant's religious rebirth and his reverence while incarcerated), *cert. denied*, 480 U.S. 940 (1987); *People v. Belmontes*, 755 P.2d 310, 339-41 (Cal. 1988) (testimony about defendant being "born again" and subsequent relationships with church members), *cert. denied*, 488 U.S. 1034 (1989); *State v. Beuke*, 526 N.E.2d 274, 279 (Ohio 1988) (testimony of defendant's religious orientation and participation in the Boy Scouts). *See also Evans v. McCotter*, 790 F.2d 1232, 1242 & n. 10 (5th Cir.) (testimony of defendant's conversion to Christianity), *cert. denied*, 479 U.S. 922 (1986).[10] Similarly, a capital defendant may, in

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[10] Clearly, the defense purpose in offering evidence of religious devotion is to show something more than the defendant will not, because of his religious beliefs, be a danger to others in the future. Indeed, where the defendant's evidence points to religious devotion preceding the homicidal act, it may be

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an effort to convince the jurors to be lenient, also produce evidence of association with organizations such as the Boy Scouts. *See, e.g., Black v. State*, No. 69,648 (Tex. Crim. App. May 29, 1991) (1991 WL 87594).[11] Unlike some states, the Delaware legislature does not dictate which facts, if proven, have a mitigating effect. *Cf. Mills v. Maryland*, 486 U.S. 367, 376 n. 8 (1988). Dawson's jury was therefore called upon to determine 1) what facts reflecting on Dawson's character were proven; 2) whether the character traits were non-statutory aggravating factors or were mitigating factors; and 3) as to all of the evidence in aggravation or mitigation, what weight to assign to each factor. *See* J.A. 131 (jury instructions). Yet, if such evidence of religious devotion and community service are admissible because they represent "positive character traits," *Franklin*, 487 U.S. at 186 (O'Connor J., concurring), sentencing jurors can give effect to such evidence only if they agree that the defendant's past or present beliefs in religious principles or his past decision to accept the tenets of the Boy Scouts or Alcoholics Anonymous represent admirable "virtues" which should be assayed against imposing death for his crime.

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difficult to convince a jury his devotion renders him non-dangerous. Instead, the defense argument concerning religious devotion is in large part a moral one, an attempt to show the jury that the defendant was generally, or has become since the crime, a good person, or at least a better one, than he was when he committed the murder. Kaplan, *Evidence in Capital Cases*, 11 Fla. St. L. Rev. 369, 375-76 (1983).

[11] Dawson told the jury that he earned good time credits by joining Alcoholics Anonymous while in prison. J.A. 79.

Of course, if based on those traits, one or more jurors elect to forego the death penalty, that particular defendant will not have been "penalized" for his religious beliefs or his association with the Boy Scouts. Yet, the extent of his punishment – life imprisonment instead of death – will still have turned on the jury's consideration of his beliefs and the jurors will not have remained value-neutral in scrutinizing those beliefs. Moreover, in a broader context, the jurors' decision to forego death based on such factors does in effect "penalize" all those other capital defendants who might be sentenced to die because they had rejected religious beliefs or found the underlying tenets of the Boy Scouts or Alcoholics Anonymous objectionable and thus could not present such evidence.

What is apparent from all this is that the usual First Amendment precepts barring governmental inquiries into beliefs and obligating the government to remain value-neutral concerning such beliefs have no application to the final discretionary stage of capital sentencing. On the contrary, in those proceedings "[i]t is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." *Barclay*, 463 U.S. at 950 (plurality opinion).[12] "[A]t least, in the

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[12] Dawson argues that because Mrs. Kisner and he were white, the evidence concerning his embrace of the Aryan Brotherhood could not be connected in any way to the murder. Without such a connection, he says it was irrelevant. Brief for Petitioner at 15-16. In so arguing, Dawson applies a much stricter definition of "connection" than has been typically used during the capital sentencing "character" inquiry. Sentencing

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absence of racial prejudice, jurors may legitimately exercise their conscience or conventional moral judgment in choosing which murderers to execute." Weisberg, 1983 Sup. Ct. Rev. at 389.

Indeed, in *Barclay*, this Court seemingly faced the same challenge Dawson now raises. In his concurring opinion, Justice Stevens, joined by Justice Powell, rejected it. Barclay had joined with three others to form a group, which they styled the "Black Liberation Army." The shared tenets of the small group were hatred of white people and the need for liberating racial war. Hoping to trigger such a clash, the members of the group kidnapped and killed a young hitchhiker, and then after the killing

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jurors, at this stage, are regularly granted the freedom to make their own evaluation of the causal connection between the capital defendant's act of murder and seemingly remote events, such as much earlier mistreatment of the defendant by a father and mother. *See Penry*, 109 S.Ct. at 2941-42; *Eddings*, 455 U.S. at 113-14.

Here a rational juror could draw a connection between Dawson's embrace of the racist ideology of the Aryan Brotherhood and his subsequent killing of Mrs. Kisner. At heart, racism is rooted in depersonalization; the racist refuses to see members of other races as individuals with unique qualities and worth. Likewise, Dawson's murder of Mrs. Kisner was the "ultimate act of depersonalization." *Payne*, 59 U.S.L.W. at 4820 (O'Connor, J., concurring). Jurors could see the murder as an "escalation" of Dawson's racist beliefs: Dawson's inability to grant respect to the individual worth and dignity of persons of another race had now grown into an unwillingness to grant respect to the individual worth or dignity of *any* human being. From this, the jurors could surmise that Dawson would remain dangerous in the future.

sent to both the media and the victim's mother messages urging mass racial violence. In sentencing Barclay to die for this murder, the Florida sentencing judge relied on his own abhorrence to the ideas of racial hatred and the need for a race war, indicating that he thought that anyone who chose to attempt to initiate such a diabolical course should be permanently removed from society by execution. *See* 463 U.S. at 948 n. 6 (reproducing trial judge's findings).

In this Court, Barclay argued that the sentencing judge should not have been able to rely on his distaste for Barclay's views on racial strife as grounds for imposing the death penalty. The plurality summarily rejected the challenge, finding that circumstances of racial hatred in the murder related to several of Florida's statutory aggravating circumstances. 463 U.S. at 949 (plurality opinion). Justice Stevens took a differing tack. After surveying the Florida capital sentencing scheme, Justice Stevens initially concluded that the evidence of Barclay's beliefs in racial hatred, evidenced by both his conduct and the messages sent after the killing, were aspects of Barclay's "background" that, under the federal Constitution, could be considered by the capital sentencer. 463 U.S. at 968-69 (concurring opinion). However, from there, he parted company with the plurality, finding that the trial judge's exposition of his deeply felt concern about racial crimes "had no bearing on any statutory aggravating circumstance." *Id.* at 970. Thus, he assumed that the Florida legislature had not singled out for more severe sanction in its capital sentencing scheme murders motivated by racial hatred. Yet, the absence of such a legislative determination did not undermine the legitimacy of Barclay's

ultimate sentence. Instead, the sentencing judge's reactions to the diabolical nature of Barclay's beliefs were valid considerations in the third stage of the Florida sentencing procedure, the stage when the sentencer had to exercise its discretion and determine if, despite all else, death was the appropriate penalty. *Id.* at 970 n. 18. At that stage, "[t]he sentencing process assumes that the trier of fact will exercise judgment in light of his or her background, experiences, and values." *Id.* at 970. Pointedly, if the trial judge in *Barclay* could use the evidence of Barclay's beliefs in racial strife as an aspect of the defendant's "background" in deciding whether to grant or withhold leniency, then Dawson's sentencing jury could rightfully consider his embrace of the Aryan Brotherhood with its racist tenets as relevant character evidence in deciding whether to impose a penalty less than death.[13]

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[13] Of course, in *Barclay*, the defendant's views and beliefs in "racial hatred" had not been simply abstract expressions, but had also been the motive for the murder. However, as noted before, "racial hatred" was not a statutory aggravating circumstance in Florida. Thus, when the sentencing judge condemned Barclay to die, he was still, for traditional First Amendment analytical purposes, foregoing value- or content-neutrality and imposing a "penalty" on Barclay for holding what the judge viewed as reprehensible ideas. As Professor Tribe has explained using an analogous hypothetical involving actual speech:

> To be sure, one who incites arson against an NAACP headquarters in a racist speech is more reprehensible than one who incites the very same arson to collect insurance proceeds, but to punish the former more severely than the latter is, arguably, to penalize a reprehensible viewpoint *as such*.

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Finally, there is something lopsided to Dawson's argument that precepts of value- and content-neutrality must apply to the discretionary stages of capital sentencing proceedings. He strenuously argues that it violates the First Amendment when the prosecutor offers evidence of the defendant's beliefs and the sentencing jurors attach a supposedly "aggravating" label to that evidence. Yet, he is silent about whether the precept of content-neutrality is transgressed when a criminal defendant offers evidence of his beliefs, such as religious devotion, in the hope that the jury will attach to them a "mitigating" label. To endorse an asymmetrical application of First Amendment constraints would undercut the Eighth Amendment's goal of reliability in capital sentencing, running counter to this Court's recent pronouncement that, in capital sentencing proceedings, "[t]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in." *Payne*, 59 U.S.L.W. at 4818 (quoting *Booth v. Maryland*, 482 U.S. 496, 517 (1987) (White, J. dissenting)). In effect, Dawson seeks to constitutionalize a one-sided view of a capital defendant's character: evidence which touches on a defendant's beliefs can mitigate, but not aggravate punishment. The decisions of this Court do not support that proposition.

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L. Tribe, *American Constitutional Law* § 12-17 at 926 (2nd ed. 1988). In light of this, Dawson cannot distinguish his argument from the one rejected by Justice Stevens in *Barclay* simply on the basis that in his prosecution there was no direct connection between his murder and his embrace of the racist Aryan Brotherhood.

3. Racial Hatred and Capital Sentencing.

In arguing here that Dawson's sentencing jury could quite properly hear evidence of his embrace of the racist prison gang styled the Aryan Brotherhood, respondent does not suggest that, at capital penalty hearings, state prosecutors may offer evidence of *any* and *all* beliefs of the capital defendant to be factored into the sentencing decision by the sentencer. Distinctions can and must be drawn.

As exemplified by the proceedings on Dawson's objections to the "Aryan Brotherhood" evidence, all such evidence is not automatically admissible. In Dawson's case, the trial court's approach was to undertake a two-step analysis. First, the trial judge made a threshold determination of the evidence's logical relevance to Dawson's character. Finding this evidence to be probative of Dawson's character, the judge then proceeded to inquire whether its "probative value is outweighed by the danger of unfair prejudice." J.A. 52. This second step was aborted by Dawson's agreement to the stipulation defining the Aryan Brotherhood. J.A. 52-53. On appeal, however, the Delaware Supreme Court[14] found that the evidence did not "improperly appeal to the jurors' passions and prejudices concerning race, religion, or political affiliation." J.A. 191 (581 A.2d at 1103). Thus, although there is no *per se* rule that bars evidence of a defendant's beliefs as

[14] The state court has an independent statutory responsibility to consider whether the "death penalty was either arbitrarily or capriciously imposed or recommended." Del. Code Ann. tit. 11, § 4209(g)(2)a (1987).

reflective of his "character" under the First Amendment, this does not mean that "unduly prejudicial" evidence can not be excluded under the Due Process Clause. *See Payne*, 59 U.S.L.W. at 4818.

Moreover, evidence reflecting on a capital defendant's enthusiasm for the ideology of racism stands on a much different footing than evidence of other possible beliefs, such as religious principles or political affiliation. If the "individualized assessment of the appropriateness of the death penalty is a moral inquiry," *Brown*, 479 U.S. at 545 (O'Connor, J., concurring), then the prosecution should only be able to place before the sentencing jury evidence of "beliefs" around which there has been an enduring moral consensus. There is such an enduring consensus about the doctrines of racism and racial superiority. The concept of equality among individuals regardless of one's race is – like the concept of freedom of speech – one of the fundamental precepts of the nation. Thus, while the Declaration of Independence included the right to rebel, it also proclaimed that "all men are created equal," although admittedly the pronouncement had a limited reach to men, and then only certain men. Declaration of Independence (1776). Nearly one hundred and forty years ago, we fought a bloody internecine war to expand that pledge to all those within this nation. Moreover, within the last generation this country waged a protracted war against a Nazi government committed to a devastating application of the ideology of racial superiority. Nor is our rejection of the ideology of racism merely a passing fancy of a contemporary majority. The Thirteenth, Fourteenth, and Fifteenth Amendments to the

Constitution make the elimination of the doctrine of racism a national goal of the utmost importance.[15] Indeed, the ideology of racial supremacy strikes at our fundamental notion that each person should be treated as a "uniquely individual human being[]." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)

The First Amendment may restrain government from criminalizing such racist beliefs. But any sense of tolerance which prevents society and government from seeking to suppress the expression of such beliefs does not require us to refrain from condemning such ideology as morally reprehensible. *See Bob Jones University v. United States*, 461 U.S. 574, 603-04 (1983) (First Amendment does not require government to give tax exemption to religious school practicing racial discrimination). *Cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them."). Freedom of speech does not require society to remain silent and withhold condemnation of racism; to do so would only seem to endorse its precepts. Thus, when one, such as Dawson, has committed a heinous murder in such a manner which the legislature has deemed sufficient reason to call for the response of the death penalty, it is neither illegitimate nor unconstitutional for the sentencing jury to weigh against a grant of the largess of mercy

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[15] Equality between individuals and freedom from racism is a norm of worldwide acceptance. *See* United Nations Charter art. 55(c); Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

the fact that one of the "virtues" of the criminal defendant is that he espouses the ideology of racial supremacy. *Cf. Rust v. Sullivan*, 111 S.Ct. 1759, 1772 (1991) (quoting *Maher v. Roe*, 432 U.S. 464, 475 (1977)) (" 'There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.' ")

4. The Aryan Brotherhood Evidence Was Relevant to the Sentencing Process.

If the First Amendment does not bar the introduction of the Aryan Brotherhood evidence, the only remaining questions are whether such evidence was relevant to the sentencing decision and whether it was presented in a fundamentally fair manner. Clearly, the Aryan Brotherhood evidence met the criteria of relevancy. First, the evidence was "relevant to show the appropriateness of the alternative punishment of [life] imprisonment [for Dawson]." *Franklin*, 487 U.S. at 190-91 (Stevens, J., dissenting). Here, as the prosecutor explained to the jury (*see* J.A. 105-06), Dawson's deliberate choice to join a prison gang stood as a counter-point to any argument that his sporadic participation in prison programs during his long years of incarceration showed that Dawson had "not [been] just sitting in prison lying around doing nothing." J.A. 121. The jurors could take from the fact that Dawson had had the gang's insignia tattooed on his body that his enthusiasm for the gang far outran his commitment to participating in rehabilitative prison programs. Furthermore, as the Delaware Supreme Court recognized, against the backdrop of a history of escapes and institutional misconduct, Dawson's decision to join a gang could be

seen as one more indication of his consistent mindset to reject any meaningful attempt to rehabilitate himself. J.A. 187 (581 A.2d at 1101-02). Such an inference was legitimate. As this Court once affirmed, in an analogous, but non-capital, sentencing context:

> "Impressions about the individual being sentenced – the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, *the degree to which he does or does not deem himself at war with society* are, for better or worse, central factors to be appraised under our theory of individualized sentencing."

United States v. Grayson, 438 U.S. 41, 51 (1978) (quoting *United States v. Hendrix*, 505 F.2d 1233, 1236 (2nd Cir. 1974)) (emphasis added). From all the evidence surrounding Dawson's earlier days in prison, including his choice to join a gang, the jurors could infer Dawson "was still disposed to evil and determined to remain hostile to society." *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937).

Moreover, the evidence of Dawson's adoption of the Brotherhood's racist ideology acted as a counterbalance to any mitigating evidence which the defendant might put before the jury of his redeeming qualities or positive character traits. That evidence acted to give the sentencing jury a complete picture of the personality of Dawson, showing a side of Dawson that stood in stark contrast to the picture of a loved nephew and brother and one who had offered to donate one of his kidneys to a dying young child. It was relevant to simply preserve "parity between mitigating and aggravating factors." *Payne*, 59 U.S.L.W. at 4820 (Scalia, J., concurring).

Lastly, in this particular case, there was little likelihood that the presentation of the Aryan Brotherhood evidence risked a sentencing verdict "impermissibly based on passion, not deliberation." *Payne*, 59 U.S.L.W. at 4821 (Souter, J., concurring). In the beginning of trial, in order to insure that the evidence would be considered with reason, not emotion, the trial court had questioned each of the prospective jurors about his ability to judge such evidence, excusing those who would not be able to consider it dispassionately. Tr. B-148-49, 170-71, 248-50; Tr. D-13-17, 57-58, 77-78. The jury received evidence about the Aryan Brotherhood through a stipulation which Dawson described on appeal as "relatively 'sterile.' " J.A. 185 (581 A.2d at 1101). Dawson could, and did, offer argument that his beliefs in white supremacy should not negate leniency and that the sentencing jury should continue to exercise toleration. J.A. 115-17. The prosecutor's argument to the jury also carefully avoided a call for an emotional reaction. Instead, as the prosecutor described it, Dawson's decision to join a racist prison gang stood in sharp contrast to any suggestion that his years in prison had led or would lead to rehabilitation. J.A. 106 ("Where is going to AA [Alcoholics Anonymous] compare with proclaiming yourself an Aryan Brother?"). Because this evidence fairly spoke to Dawson's character as a unique individual, the jurors could properly consider it in exercising their discretion to extend leniency or impose the death sentence.

CONCLUSION

For the above reasons, this Court should affirm the decision of the Delaware Supreme Court upholding Dawson's death sentence.[16]

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[16] At the penalty hearing, Dawson did not object to the sentencing jury learning that he had a tattoo of the name "Abbadon" or that he identified himself by that moniker several hours after the murder and explained that it meant "one of Satan's disciples." J.A. 57 (counsel's position); J.A. 80-81, 85-86 (evidence). In the Delaware Supreme Court, he unsuccessfully sought to overturn his sentence based on the admission of that evidence. J.A. 185, 187-92 (581 A.2d at 1100, 1101-03). However, in this Court, Dawson has not, in his initial petition or in his brief, raised any challenge about the admission of the "Abbadon" evidence. In fact, he has relegated his discussion of it to a footnote in his brief. Brief for Petitioner at 12 n. 5. In contrast, his *amici* suggest that the "Abbadon" evidence is an alternative ground to overturn the death sentence. Brief for American Civil Liberties Union, *et al.*, as *amici curiae* at 3, 5, 12. In light of Dawson's apparently deliberate decision to forego challenging the Abaddon evidence, the question of its admissibility should not be before this Court. Supr. Ct. R. 14.1(a). *See Holland v. Illinois*, 110 S.Ct. 803, 811 n. 3 (1990).

In addition, the Abbadon evidence was different in kind from the evidence of Dawson's embrace of the Aryan Brotherhood. Although the moniker has a religious origin and its definition refers to the religious symbolism of angels, *see* J.A. 188 n. 26 (581 A.2d at 1102 n. 26), no attempt was made to use the evidence to link Dawson to any religious belief or sect. Indeed, the prosecution cautioned the sentencing jury not to make any such connection. J.A. 105. Instead, as the Delaware Supreme Court recognized, the evidence was introduced to show how Dawson saw his own *persona*. J.A. 187 (581 A.2d at 1102). The inference to be drawn from the evidence was no different than the one arising if Dawson had a tattoo of the

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word "killer" and had described himself as such after the murder at the bar in Milford. *See Jones v. Butler*, 827 F.2d 1006, 1011-12 (5th Cir. 1987), *cert. denied*, 486 U.S. 1046 (1988). By hearing that Dawson had declared, not only throughout his life, but right after the murder, that he saw himself as "one of Satan's disciples," the jurors could decide that Dawson, in his own mind, did not see his killing of Mrs. Kisner to be "an aberration of otherwise good character." *Boyde*, 110 S.Ct. at 1199 n. 5.